

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of: )  
 )  
Lakedale Telephone Company )  
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 )  
Certification to Operate an )  
Open Video System )  
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**MEMORANDUM OPINION AND ORDER**

**Adopted: April 4, 2003**

**Released: April 4, 2003**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. On March 25, 2003, Lakedale Telephone Company ("Lakedale") filed an application for certification to operate an open video system pursuant to Section 653(a)(1) of the Communications Act of 1934 ("Communications Act") and the Commission's rules.<sup>1</sup> Lakedale seeks to operate an open video system in Wright County, Minnesota (the "Service Area").<sup>2</sup> In accordance with our procedures,<sup>3</sup> the Commission published notice of receipt of the Lakedale certification application<sup>4</sup> and posted the application on the Internet.<sup>5</sup> Sherburne/Wright County Cable Communications Commission ("SWCCCC") filed comments.<sup>6</sup>

2. Pursuant to Section 653(a)(1) of the Communications Act, any entity meeting the requirements may obtain certification to operate an open video system.<sup>7</sup> In light of the brief period (ten

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<sup>1</sup> 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1502.

<sup>2</sup> The Service Area for which Lakedale seeks certification in Minnesota is Maple Lake, CUID MN 0456.

<sup>3</sup> See *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, 18247 (1996) ("Second Report and Order").

<sup>4</sup> See *Public Notice*, "Lakedale Telephone Company Files An Application For Open Video System Certification," DA 03-0921 (MB, rel. March 26, 2003).

<sup>5</sup> The Lakedale application is available via the Internet at <http://www.fcc.gov/mb/ovs/csovsceer.html>.

<sup>6</sup> SWCCCC indicates that it is a joint powers cable commission under the laws of Minnesota, consisting of ten member cities. It states that SWCCCC and its member cities are responsible for protecting and promoting the health, safety, and welfare of their member cities' citizens. SWCCCC Comments at 1-2.

<sup>7</sup> See 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1501. An operator of a cable system however, generally may not obtain such certification within its service area unless it is subject to "effective competition" as defined in Section 623(1)(l) of the Communications Act, 47 U.S.C. § 543(1)(l). The effective competition requirement does not apply to a local exchange carrier that is also a cable operator that seeks open video system certification within its cable service area.

days) for Commission review of certification filings, the Commission concluded that Congress intended there to be a streamlined certification process.<sup>8</sup> Open video system operators may apply for certification at any point prior to the commencement of service. Open video system operators must obtain certification prior to the commencement of service, allowing sufficient time to comply with the Commission's requirements regarding notifications that applicants must provide to potential programming providers.<sup>9</sup>

3. As part of the certification process, the applicant must acknowledge and accept the obligations associated with operation of an open video system and must provide certain information regarding its proposed system.<sup>10</sup> To obtain certification, an applicant must file FCC Form 1275, which requires, among other things: (a) a statement of ownership, including a list of all affiliated entities;<sup>11</sup> (b) a representation that the applicant will comply with the Commission's regulations under Section 653(b) of the Communications Act;<sup>12</sup> (c) a list of the names of the communities the applicant intends to serve; (d) a statement of the anticipated type and amount of capacity that the system will provide; and (e) a statement as to whether the applicant is a cable operator applying for certification within its cable franchise area.

## II. COMMENTS

4. SWCCC states that it supports robust competition in the provision of video programming, welcomes Lakedale's bid to enter the video carriage market, and looks forward to working with Lakedale to make the arrangements necessary to bring the benefits of video competition to its member city, Maple Lake, Minnesota.<sup>13</sup> SWCCC, however, states that Lakedale's application should be denied due to lack of candor and because the application is incomplete.<sup>14</sup> It states Lakedale's application raises certain issues and it is especially concerned about Part C, Question 1 on Form 1275 which asks, "If you are a cable operator applying for certification within your cable franchise area, are you qualified to operate an open video system under 47 C.F.R. § 76.1501?" SWCCC indicates that Lakedale marked the box labeled "N/A" for "not applicable." SWCCC asserts that by merely checking the "N/A" without further explanation, Lakedale failed to inform the Commission fully regarding information that could be material in determining whether Lakedale is eligible to be certified as an open video system operator.<sup>15</sup> SWCCC

<sup>8</sup> *Second Report and Order*, 11 FCC Rcd at 18243.

<sup>9</sup> *Id.* at 18247; 47 C.F.R. § 76.1502(a). *See also Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Order on Remand, 14 FCC Rcd 19700, 19705 (1999)(deleting the pre-construction certification requirement from Section 76.1502(a) of our rules).

<sup>10</sup> *Second Report and Order*, 11 FCC Rcd at 18245-46.

<sup>11</sup> For purposes of determining whether a party is an affiliate, we have adopted the definitions contained in the notes to Section 76.501 of our rules, 47 C.F.R. § 76.501, with certain modifications. 47 C.F.R. § 76.1500(g). Generally, we will consider an entity to be an open video system operator's "affiliate" if the open video system operator holds 5% or more of the entity's stock, whether voting or non-voting. *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Third Report and Order and Second Order on Reconsideration*, 11 FCC Rcd 20227, 20235 (1996) ("*Third Report and Order*"); 47 C.F.R. § 76.1500(g).

<sup>12</sup> 47 U.S.C. § 573(b). This provision sets forth the Commission's requirements regarding non-discriminatory carriage; just and reasonable rates, terms and conditions; a one-third capacity limit on the amount of activated channel capacity on which an open video system operator may distribute programming when demand for carriage exceeds system capacity; channel sharing; sports exclusivity, network non-duplication and syndicated exclusivity; and non-discriminatory treatment in presenting information to subscribers. *See also* 47 C.F.R. § 76.1502(a).

<sup>13</sup> SWCCC Comments at iii.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 3.

argues that Lakedale's application raises immediate questions about its affiliations and status as a cable operator because of Lakedale's affiliation with WH-Link. SWCCCC asserts that WH-Link is applying for cable franchises with nearby franchising authorities.<sup>16</sup> SWCCCC asserts that, because of this affiliation, Lakedale should not have merely checked the "N/A" box on Form 1275 without further explanation. SWCCC also states that Lakedale and WH-Link are acquiring their video signals from another affiliated company, Broadband Visions, LLC, which also provides video signals to Connections Etc.,<sup>17</sup> which uses the same technology as Lakedale and recently obtained a cable franchise from Big Lake, Minnesota.<sup>18</sup> SWCCCC asserts that since Connections Etc. held the belief that it was a cable operator and applied for a cable franchise, Lakedale should be viewed similarly.<sup>19</sup>

5. In addition, SWCCC indicates that Lakedale failed to include on its Form 1275 two companies which should have been listed as affiliates, and consequently, SWCCC contends that Lakedale's application should be considered incomplete.<sup>20</sup> SWCCCC additionally asserts that Lakedale must obtain all necessary authorizations prior to placing facilities in the public rights-of-way required in each of the local communities.<sup>21</sup> It states that it expects Lakedale to obtain all necessary authorizations and permits governing the use of public rights-of-way before using such public property for OVS purposes, including taking the steps necessary to acquire a cable franchise.<sup>22</sup> Although SWCCCC asserts that the Commission should deny Lakedale's certification, it states that if the Commission decides to approve the certification, such approval should be subject to the condition that Lakedale obtain any necessary authorizations to use public rights-of-way.<sup>23</sup>

### III. DISCUSSION

6. Lakedale has submitted an application on FCC Form 1275 for certification to operate an open video system in the Service Area. We have reviewed the information contained in Lakedale's application. As required by Form 1275, the Lakedale application provides the following: company information and a separate statement of ownership listing affiliated entities; eligibility and compliance representations; and system information and verification statements. The certification process, as confined as it is must resolve legitimate issues each application presents, and the applicant bears the burden of providing a record allowing the Commission to determine whether the salient elements of the certification process have been met.

7. In this application, we are presented with the unresolved issues of whether Lakedale is a cable operator within the Service Area and the completeness and accuracy of Lakedale's application. SWCCCC asserts that WH-Link and Lakedale are affiliated companies, that both companies share the same President/CEO, that WH-Link has applied for cable franchises with nearby franchising authorities, and that the status of WH-Link as a cable operation is currently being litigated before the Minnesota Court of Appeals. SWCCCC's allegations raise questions regarding Lakedale, but the evidence introduced fails to definitively indicate that Lakedale, or its affiliate, is a cable service provider in the community affected by its open video system certification application. A possible explanation for

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<sup>16</sup> *Id.*

<sup>17</sup> Lakedale does not indicate that Connections Etc. is affiliated with Lakedale, or any of its affiliates.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *See id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.* at 10.

Lakedale having marked “N/A” on its Form 1275 is that Lakedale is not a cable operator and no further explanation was necessary. However, because the brief 10-day period for open video system certification does not permit a reply from Lakedale to assist in resolving these issues, we cannot assume that SWCCCC’s assertions have no basis.

8. The Commission must have full confidence in the truthfulness of representations made to it by applicants for Commission authorization to provide a service or operate a facility. As the United States Court of Appeals for the District of Columbia Circuit has stated, “the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts its needs in order to fulfill its statutory mandate.”<sup>24</sup> An applicant’s failure to come forward with a candid statement of relevant facts, whether or not such information is particularly elicited by the Commission, is a breach of the applicant’s obligation to be truthful.<sup>25</sup> There is an inconsistency between SWCCCC’s allegations and certain information included in Lakedale’s Form 1275. We need additional information, particularly from Lakedale, in order to conclude that Lakedale has been candid and complete in its application filing.

9. With regard to the public rights-of-way and the franchising issue, we note that these concerns do not relate to the adequacy and accuracy of Lakedale’s application and therefore are beyond the scope of the open video system certification process. Nevertheless, we note that the Commission has stated that “[m]anagement of the right-of-way is a traditional local government function. Local governments should be able to manage the rights-of-way in their usual fashions without the imposition of unique requirements for open video systems.”<sup>26</sup> Thus, the Commission has made clear that the open video system certification process does not usurp the authority of local governments to control use of the public rights-of way. With regard to the process of obtaining local franchising authority, in the *Order on Remand* of the Fifth Circuit’s decision in *City of Dallas, Texas v. FCC*, the Commission stated that the Fifth Circuit determined that localities retain existing franchising authority, but that localities need not exercise this authority through the imposition of open video system franchises.<sup>27</sup> The Commission stated that the decision of whether to impose a franchise on an open video system operator is committed to the discretion of the locality.<sup>28</sup> In this regard, we note that the decision of Connections Etc. to pursue a cable franchise with Big Lake, Minnesota is irrelevant to our certification determination. As a new entrant to the multichannel video programming distribution marketplace, Lakedale was free to seek a cable franchise or pursue open video system certification, as it has done here.

10. The Commission must be able to rely on the accuracy and adequacy of the representations contained in the Form 1275 certification application. In this instance, we believe that SWCCCC has raised sufficient concern regarding Lakedale’s application to require that we deny Lakedale’s open video system certification. We note that denial of an open video system certification application does not preclude an applicant from filing a revised certification application or from refileing its original submission with a statement addressing the issues in dispute.<sup>29</sup> Such refileings must be served on any objecting party or parties and affected local communities. Lakedale is free to refile at any time an application that addresses the issues raised by SWCCCC.

<sup>24</sup> *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 and 457 U.S. 1119 (1982).

<sup>25</sup> See *Wedgewood Communications Company*, 12 FCC Rcd 19563 (1997); 12 FCC Rcd 18281 (1997).

<sup>26</sup> See *Third Report and Order*, 11 FCC Rcd at 20311.

<sup>27</sup> *Open Video Systems*, 14 FCC Rcd 19700, 19704 (1999); see *City of Dallas, Texas v. FCC*, 165 F. 3d 341 (5<sup>th</sup> Cir. 1999), *reh’g denied*, Nos. 96-60502, 96-90581 and 96-60844 (5<sup>th</sup> Cir. May 28, 1999).

<sup>28</sup> *Id.*

<sup>29</sup> 47 C.F.R. § 76.1502(d).

**IV. ORDERING CLAUSES**

11. Accordingly, **IT IS ORDERED**, that the application of Lakedale Telephone Company for certification to operate an open video system in the Service Area<sup>30</sup> **IS DENIED**.

12. This action is taken by the Deputy Chief, Policy Division, Media Bureau, pursuant to the authority delegated by Section 0.283 of the Commission's Rules.<sup>31</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert  
Deputy Chief, Policy Division  
Media Bureau

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<sup>30</sup> See *supra* n. 2, listing the community contained within the Service Area.

<sup>31</sup> 47 C.F.R. § 0.283.